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NO. 84-1440
IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1984

ALWIN E. HOPFMANN, GREGORY HESSION, CLARENCE PERKINS, CLARENCE PAULIN, and BETH SULLIVAN,

Appellants,

V.

MICHAEL JOSEPH CONNOLLY, FRANCIS X. BELLOTTI, CHESTER G. ATKINS and THE DEMOCRATIC COMMITTEE OF MASSACHUSETTS,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

PLAINTIFFS/APPELLANTS' SUPPLEMENTAL BRIEF OPPOSING THE MOTION TO DISMISS OR AFFIRM OF APPELLEES CHESTER G. ATKINS AND THE DEMOCRATIC STATE COMMITTEE

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STATEMENT OF THE ASSUMPTION ADVANCED BY DEFENDANTS/APPELLEES CHESTER G. ATKINS AND THE DEMOCRATIC STATE COMMITTEE

The Constitution is conspicuously silent regarding political parties. The antipathy of the Founding Fathers toward them is too well known to require elaboration. The study of the parties of 18th century England in operation, with their power to control candidate selection absolutely, led to the omission of them from the Constitution and the installation of the "Times, Places and Manner Clause," Art I, Sec.4,Cl.1, and the "Qualifications Clauses," (That for the senate's Art.I, Sec.4,Cl.) to guard against their rise to power over candidates and to guard against the excesses of "faction."

The attempt of the defendants to radically depart from the intended treatment of political parties in the Constitution and find in the First Amendment-derived right of Freedom of Association an inherent private lawmaking power in parties by which an inner group of a party may promulgate a rule and either A) as defendants contended below, "incorporate" that rule into laws actually passed by a legislature against that legislature's will, or B) as the court below found on its own accord, compel, against the will of the legislature as the holder of the authority, "delegation" of the legislature's authority to make election laws governing ballot access to

the party inner group, constitutes an effort to overthrow the will of the Founding Fathers and insert parties into the Constitution. As such it relies, in this motion, and has throughout, upon obfuscation, deliberate confusion, and other tactics of disinformation. First among these is the tactic of assuming in the premises that which is really the conclusion.

Thus we see Atkins stating in his Statement of Facts that which is not fact at all, but is rather the radical contention that must be upheld by this Court if he and the Committee are to get away with their scheme to convert the American constitutional system into the

kind of system favored in Europe which the Founding Fathers rejected.

Thus we are told, as a fact, (p.13) that "Candidates...must satisfy several statutory requirements." The motion then lists "statutory requirements," among which is the requirement that the candidate "comply with all party rules governing primary ballot access that neither defeat the purpose of a primary election nor violate the constitutional rights of candidates or voters. Langone, supra, 388 Mass. at 194, 446 N.E.2d at 48." Now, I hope all the clerks who work on this case for the justices realize just how clever and smart this is. You see, you are not supposed to realize that

actually this is not a fact at all but a conclusion regarding perhaps the most central question in the case. Perhaps you can think of other "statutes" that are not statutes at all but rather rules that neither defeat the purpose of a primary election nor violate the constitutional rights of candidates or voters.

Admittedly, there is as of yet no codification of such supplements to the laws (the laws as the legislatures actually write them,) but that shouldn't stop anybody from exercising their First Amendment right to add to the laws. So the appellees urge you to just accept such additions as facts, on their say so. Think it over won't you.

The appellees did neglect to mention, (p.16), that in "following the model so successfully used (and upheld) in Connecticut," one little detail was left out: in Connecticut the legislature did prescribe the 20 Percent Rule in duly enacted statutes. We think this little omission tells more about the reliability of the representations in the motion than the statement tells about the "success" of the 20 percent rule in Connecticut. We point out that from p. 17 on the "Statement of Facts," contains some facts but is largely argumentation.

THE RES JUDICATA CONTENTION

One of the principal contentions in the motion is that, the First Amendment

claim having been instituted, and the party rule having been "added to" the statutes as written, the entire matter is now disposed of by this Court's rejection of the appeal or cert petition in Langone v Secretary of the Commonwealth, 388 Mass. 185, 446 N.E. 2d, which was in this Court as Bellotti v Connolly, 460 U.S. 1057 (1983), since somewhere along the way the First Amendment claim got magically transmuted into an independent interpretation by a state's highest court of one of its statutes, with no federal questions involved.

In our opposition brief to which this is a supplement we dealt with the question of why a U.S. senate race is not the same

as a state lt.-gubernatorial race and how, under the specific provisions of the Constitution governing senatorial races, all matters must be considered.

Now we address the other aspect of this argument of Defendants/appellees, the Hicks v Miranda argument, 422 US 332, 343--44: Citing Hicks, Atkins contends that this Court's refusal to hear the appeal or cert of Langone and Bellotti was a decision on the merits. We call the Court's attention to its later decision in Mandel v Bradley, 432 US 173 (1977) (Per Curiam.) That decision appears to have established that there is ambiguity inherent in summary dispositions and to

have established also the nature of the analysis that is essential before a decision can be made as to whether it is appropriate to accord a particular summary disposition precedential effect.

First, the constitutional questions presented must be the same. We have already seen that they are not. In this case there are questions raised by the Times, Places, and Manner and Qualifications Clauses, and the XVIIth Amendment which were simply not present in the earlier case.

Second, if the constitutional questions are precisely the same, as here they are not, then the judgment in fact must have rested upon decisions of those

points and not even arguably upon some alternative nonconstitutional ground. And it makes no difference that the unusually strong 3-justice dissent dissented from the idea that no appeal lay. That still leaves it ambiguous as to whether the rejection was essentially a denial of cert or not. This means that there is no precedential effect. Maryland v Baltimore Radio Show, 338 US 912, 919 (1950); Hughes Tool Co. v TWA, Inc., 409 US 363, 365-66 n. 1 (1973).

THE DELEGATION GAMBIT

Contrary to the several assertions of the appellees, we make no claim that state lawmaking processes may not constitution-

ally include party rules and procedures. (Motion, p 25) What we assert is that party rulemaking processes may not constitutionally include state lawmaking processes against the will of the legislatures in a manner, such as is claimed, that would enable the party to force the rules into the laws. So the appellees' citations of Clark v Rose, 379 F. Supp. 73 (SDNY 1974), and other such cases are beside the point. There is not a case cited that supports the contention that a political party may compel the state lawmaking process to include political party rules and procedures where the legislature, as it has in this case, has revoked the authority in question,

refused to re-enact it on several occasions, and has repudiated the rule claimed to include the state laws.

Essentially, appellees are arguing that because they say we have attacked the notion of authority's being delegated by a legislature they have a delegation of authority which we are attacking. All the cases they cite have in them a delegation of authority by a legislature, or else they involve situations where the statutes are silent. What appellees fail to show, however, is that the Massachusetts legislature ever delegated the authority which they claim. The record is clear that it did not.

PRE-EMPTION ENTITLES TO AN APPEAL

Either an authority is delegated from A to B or it is not delegated from A to B. Either it is delegated or it is revoked. It cannot be simultaneously both revoked and delegated. Yet this logical impossibility is what Atkins claims in trying to deny our right of appeal. The lower court has found a delegation, which the other side now argues. The delegation pre-empts the revocation in the 1973 statute and restores pre-primary conventions. It is that simple.

THERE IS NO RIGHT OF PARTIES TO ESTABLISH CANDIDATE SELECTION PROCEDURES IN RACES FOR THE NATIONAL CONGRESS.

We previously cited the positive authority for this proposition. The

authority cited in the Motion by Atkins to support the opposite point of view are inapposite and readily distinguished. (p.32). All of this authorit y involves situations where no constitutional mandate applies (Puerto Rico, national party presidential conventions.) or where a constitutional system is no longer applicable (discretionary electoral college.)

SMILEY V HOLM

It is certainly nice to see so much discussion of Smiley v Holm, 285 US 355 (1932), which, until now, appellees have avoided like the plague despite the repeated citation of it by plaintiffs.

However, we feel constrained to point out that the conclusions drawn from the case in both motions are a bit odd. They essentially are ignoring the fact that the legislature has repudiated the authority for a pre-primary convention and rules to go with it in every way that a legislature can. Their argument is that a private lawmaking authority such as is claimed here, though claimed pursuant to the First Amendment, is, nonetheless, authority that is prescribed by the Massachusetts legislature in the manner specified by the laws of Massachusetts. This is so, they say, because of the decision of the Supreme Judicial Court interpreting the state statutes as not having their plain

meaning in order to accomodate the claimed First Amendment right. This decision, it is argued, upholding, as it does, the claimed federal right of the party to add to the laws as written, is, nonetheless, part of the "entire lawmaking process as construed by that state." In other words, the legislature, the body to which the Founding Fathers delegated the Times, Places and Manner authority in the first place, subject to the authority of Congress to override, can be totally bypassed because of the alleged freedom of association right and state court's interpreting federal First Amendment claims put in its stead. We respectfully submit that this is utter nonsense, and

comes close to the 'big lie" techniques of totalitarian propaganda. IF there is one thing that Smiley does not stand for, it is the defiance and bypassing of state legislatures. Not only would this pervert the meaning of the clause in the first instance, it would also mean that, since Congress has an override authority under Art.I,Sec.4,Cl.1, the party, with its inherent right of Freedom of Association, could add to the laws of Congress and, if a friendly state court could again be lined up, could have that authority be part of the procedures prescribed by Massachusetts for making its laws.

There is absolutely nothing

prescribed by the State of Massachusetts as part of its regular way of making laws that provides for private lawmaking against the wishes of the legislature.

THE XVIITH AMEND MENT

Because the case was dismissed before discovery could be had and argumentation developed and refined, the XVIIth Amendment arguments were not developed in depth until the briefing in the court of appeals. Nonetheless, we are entitled to argue this amendment and have it considered as a standard and substantively.

CLEMENTS V FASHING

This case is cited to support the assertion that a candidate has no

fundamental right to run in a party primary. However, that is irrelevant here. For a U.S. senator candidate, once the legislature of his or her state has prescribed pursuant to Art.I,Sec.4,Cl.1, has a right to run under that prescription, unless the legislature has actually delegated, under the same properly done laws, part of its authority to a party. But certainly the legislature has done nothing of the kind in this instance.

WRITE-INS

A write-in possibility does not make up for improper ballot access burdens. Lubin v Panish, 415 US 709; McCarthy v Briscoe, 429 US 1317; Bullock v Carter,

405 US 134; Communist Party of Indiana v Whitcomb, 414 US 441; U.S. v Classic, 313 U.S. 299.

Care must be taken not to confuse the interests of partisan organizations with governmental interests. Elrod v Burns, 427 US 347, 362. A primary is a state function of a party. Marchiori v Chaney, 442 US 191.

Respectfully Submitted.

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CERTIFICATE OF SERVICE

I hereby certify that I have served by United States mail, first class, postage prepaid, this 23rd day of April, 1985, true and accurate copies of the foregoing brief in opposition to the motion to dismiss or affirm of defendants Atkins and the Democratic State Committee upon Thomas R. Kiley, Ass't Att'y General, One Ashburton Place, Room 2001, Boston, Mass., 02108, counsel of record for defendants Connolly and Bellotti, 3 copies for each defendant, and on Keith Long, Esq., Herrick and Smith, 100 Federal Street, Boston, MA, counsel of record for defendants Atkins and the Democratic State Committee, 3 copies for each defendant.

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